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Supreme Court of the United States

October Term, 1973

No. ~~73~~ 1685

BERTHA ARBER and ANN ARBER BROEK,
Petitioners,

vs.

ESSEX WIRE CORPORATION and WALTER F. PROBST,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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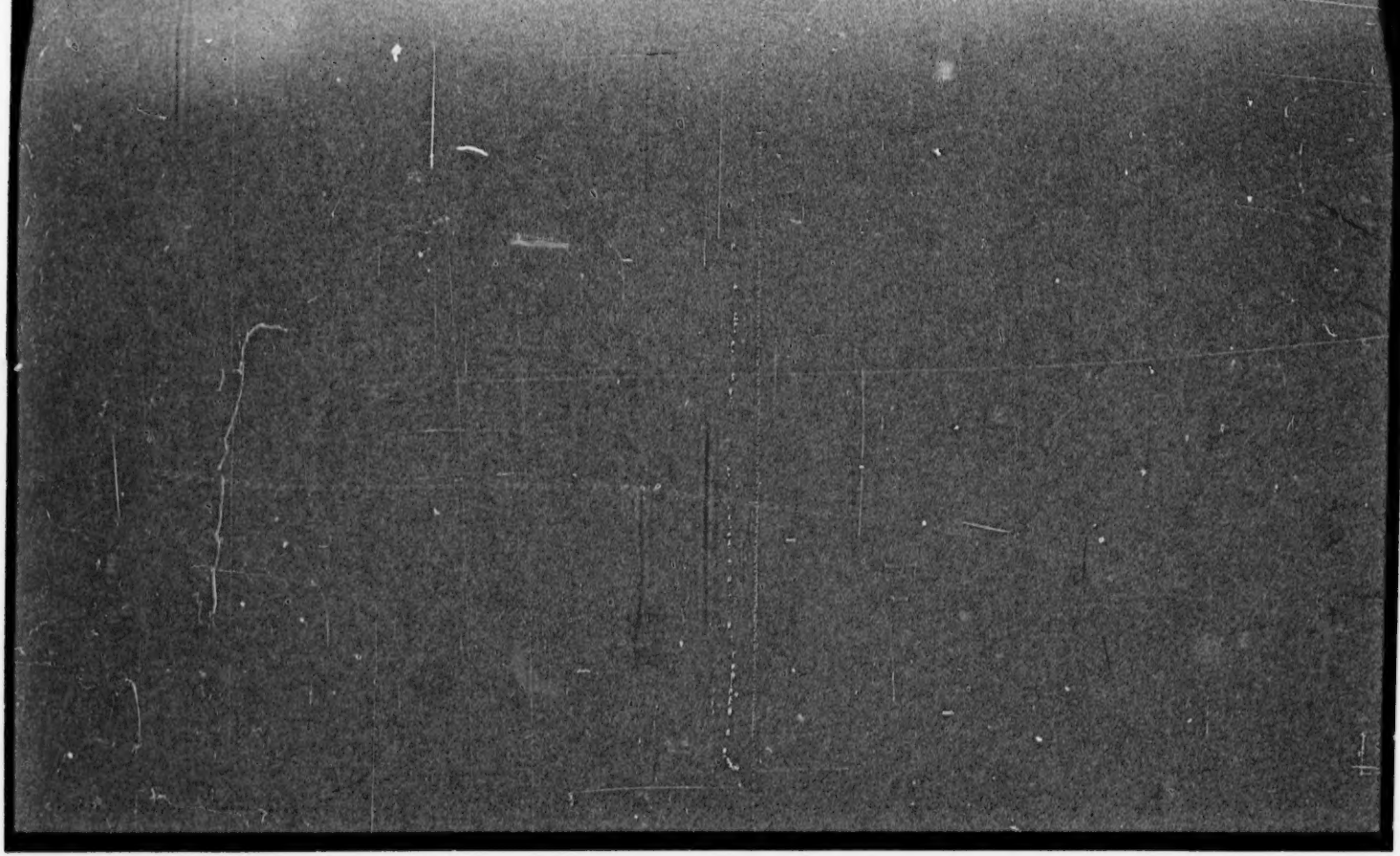

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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

To The Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Bertha Arber and Ann Arber Broek, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth District entered January 8, 1974, a timely filed Petition for Rehearing being denied February 11, 1974.

CITATIONS TO OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the District Court are presented in Appendix A of this Petition. The Court of Appeals decision and judgment of January 8, 1974, published at 490 F.2d 414, appears as Appendix B of this Petition. The Order of the Court of Ap-

peals Denying the Petition for Rehearing entered February 11, 1974 is printed as Appendix C of this Petition.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 8, 1974. The Petition for Rehearing was denied February 11, 1974.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Section 1254.

QUESTIONS PRESENTED

1. Whether the decisions below which mark a victory for the philosophy *caveat emptor* and a defeat for the philosophy of full disclosure in securities transactions should be reviewed by this Court.

2. Whether a corporation which undertakes to be a market maker in its own stock owes a duty to outside shareholders to inform such shareholders of facts which objectively might affect the decision of the shareholder to hold the stock or to accept an offer from the corporation.

3. Whether a corporation which undertakes to be a market maker for its own stock may excuse the failure to disclose important facts about the stock to an outside shareholder upon a showing that some management shareholders sold some of their stock for the same price near the time of the transaction.

4. Whether the Seventh Amendment right to trial by jury may be denied to a litigant where the jurisdictional basis for trial by jury is stricken prior to trial, and only reinstated after the trial and at the same time as the judgment is rendered.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Seventh Amendment:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States than according to the rules of the common law.

15 U.S.C. Section 78 j:

> It shall be unlawful for any person, directly or indirectly by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> (a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange, or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. June 6, 1934, c. 404, Section 10, 48 Stat. 891.

Rule 10b-5, 17 C.F.R. Section 240.10b-5

It shall be unlawful for any person, directly or indirectly by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of a national securities exchange,

(1) to employ any device, scheme, or artifice to defraud.

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

STATEMENT OF FACTS

1. Regarding the stock transaction.

Herman Arber died in 1948. At the time of his death, he was employed by the Essex Wire Corporation. He was survived by the plaintiffs, his widow, Bertha[1] and his minor daughter, Ann. He bequeathed 500 shares of Essex stock to Bertha and Ann, the will providing that the dividends be paid to Bertha during her lifetime, and upon her death the Essex common stock was to be the property of Ann. Bertha owned 25 shares of Essex common stock in her own name.

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1. Bertha Arber died during the pendency of this action and Ann Arber Broek, as her executrix, continued the action on Bertha Arber's behalf.

The Essex stock was not publicly traded. The only market was a market created by the corporation itself and certain members of Essex management. Essex and Essex management were the only persons willing to buy Essex stock.

On several occasions between Herman Arber's death and 1961, the President of Essex approached the plaintiffs to purchase their stock, mentioning various prices up to $250.00 per share. In 1961, the President informed the plaintiffs that they were fortunate to have waited because the "going price" had gone up from $250.00 per share to $350.00 per share.

The term "going price" was an euphemism used by Essex management to describe an administered price established by the management.

All of the approaches by Essex to the plaintiffs were made by its President. The plaintiffs remembered him as a visitor to their home. He had been a pallbearer at Herman Arber's funeral and was considered a friend of the family. His daughter was a student at the local school at which Ann was a teacher and she was a member of a school club of which Ann was the sponsor.

In May of 1961, the plaintiffs sold the 525 shares of Essex Common Stock to the defendant corporation for $350.00 per share.[2]

The uncontroverted evidence established the existence of important facts which the plaintiffs did not know and which neither the defendant Corporation nor its President

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2. In 1965, Essex shares were offered to the public at a price, after adjustment for an 80:1 stock split equivalent to more than $2,000.00 per share transferred in 1961. At the time of the trial in the District Court, the stipulated market price per the Wall Street Journal was more than $8,000.00 per share transferred in 1961.

disclosed. These undisclosed facts divide into two classifications.

First, an examination of the books and records of the corporation would reveal:

1. The book value as of January 1, 1961 preceding the transaction was $459.46, per share, more than double the going price.

2. The net earnings per share for the two years preceding the transaction were $83.20 for 1959 and $69.60 for 1960 from which $6.40 per share was paid in dividends ($3.20 per year) leaving $146.40 in retained earnings just for those two years. It was uncontroverted that earnings per share were figures which were never shown to anyone at that time.

3. Essex executives as a class, Essex Wire as a Company, and Walter Probst individually, were aggressively purchasing Essex stock at the same time Probst was advising the petitioners to sell. Many of these transactions were financed by no interest loans to the executives from Essex. It was called the "bonus list."

In the second classification is information which would not have been readily ascertained from the books of the corporation.

1. The "going price" was a price set and maintained by management.

2. The "going price" maintained by the corporation was increased from time to time, but was *never decreased.* Essex management had effectively established a "floor" for the stock. Indeed the key employees' stock purchase plan (the "bonus list") was in part based upon the key ingredient of a floor under the administered price. Essex executives had obtained huge loans from Essex to purchase

Essex stock. These loans ran into millions of dollars. Without the floor price, many Essex employees could have faced financial ruin.

The District Court held that the requisite "materiality" of undisclosed facts could be demonstrated only by a showing of nondisclosure of "special facts" such as mergers, or sale of assets, not ascertainable from the books which "greatly appreciate" stock value.

The Circuit Court held that the "special facts" test applied by the District Court was too restrictive to comport with the Congressional judgment that full disclosure will help to ensure fair dealing in inside transactions. The Circuit Court held the proper test for "materiality" to be the "reasonable man" test of *Securities and Exchange Commission v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968).

But then the Circuit Court proceeded to hold (1) that the insider had no duty to disclose data found in the statements and books of the corporation; and (2) that detailed knowledge of the precise mechanism for establishing the "going price" would not have affected the choice of action of a reasonable person in the position of the Arbers.

In arriving at the second conclusion, the Circuit Court considered that the District Court had found the price to be fair and reasonable based upon "expert" testimony and contemporaneous transactions between Essex and other sellers.

2. Regarding the denial of trial by jury.

Prior to the trial, the District Court conducted a jurisdictional hearing and ordered the plaintiff's cause of action based upon a violation of the Securities Exchange Act of

1934, 15 U.S.C. Section 78 j (b), and the Securities and Exchange Commission's Rule 10b-5 stricken from the Complaint, despite the fact that telephones, United States Mails, and a foreign bank had been used in the transaction.

Just a few moments before the trial commenced, the District Court announced its intention to grant the motion of the defendants to strike the plaintiffs' demand for a "trial by jury".

During the trial, the evidence came to light which formed the subsequent basis for the District Court to hold that jurisdiction based upon use of the mails and interstate commerce was established. Plaintiffs' counsel promptly moved for a reconsideration of the jurisdictional ruling. The District Court took the motion under consideration. At the conclusion of the evidence, after the trial was over, the Court instructed counsel to brief the question of the S.E.C. Rule 10b-5 violation because "I *may* decide to reinstate that Federal cause of action. . ." (emphasis added).

The District Court then proceeded in the subsequent judgment to reinstate the cause of action which had been stricken, but then ruled against the plaintiffs upon the merits of the cause of action.

The Circuit Court overruled the assignment of error with respect to the denial to the plaintiffs of a trial by jury.

REASONS FOR GRANTING WRIT

1. The decisions below deserve the attention of this Court because these decisions monument a victory for the doctrine of caveat emptor in securities transactions and a defeat for the philosophy of full disclosure.

This Court has stated that the Securities Exchange Act of 1934 embraced a fundamental purpose to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry. *Securities and Exchange Commission v. Capital Gains Research Bureau*, 375 U.S. 180, 186 (1963). *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972).

This case extends to this Court the opportunity to apply the foregoing great principle to the situations where corporations and corporate management undertake to solicit outside shareholders for the purchase of their shares.

Thousands of corporations have common stock which is not publicly traded. Millions of citizens own common stock in such corporations.

The decision below initially holds that ". . . an insider has no affirmative duty to direct a seller's attention to all routine data commonly found in the statements and books of the corporation,". Then the holding continues with three qualifications: ". . . at least where the information is readily available; the outsider has knowledge that it is readily available and makes no inquiry; and the information thus available is not of an *unusual* or *extraordinary* nature" (emphasis added).

It is submitted that the foregoing rule adopted by the Circuit Court is a refined application of the philosophy of *caveat emptor*. The rule minimizes the obligation of the party in possession of material information, and places the burden upon the uninformed party to dig the information out. Indeed, the latter of the three qualifications ("unusual or extraordinary nature") is a restatement of the "special facts" rule, which the Circuit Court previously had expressly rejected.

Petitioners contend that the proper rule was announced in *Affiliated Ute Citizens v. United States*, *supra*. "All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision." 406 U.S. 128, 153, 154.

The Circuit Court's "constructive information" rule about statements and books can apply to the appreciable earnings per share and the book value of more than double the "going price" of the Essex stock.

But, the Circuit Court never came to grips with the nature and quality of the "going price". That is a subject which could not conceivably be understood from statements and books. The Circuit Court noted certain contemporaneous transactions, then stated: "In this context, we do not think that detailed knowledge of the precise mechanism for establishing the 'going price' would have affected the choice of action of a reasonable person in the position of the Arbers." Then the Circuit Court relegated Petitioner's reliance upon *Affiliated Ute Citizens* to a footnote. The footnote implies that *Affiliated Ute Citizens* would not apply to the nondisclosure of the nature of the going price because "In *Ute*, for example, the Court expressly observed that the record revealed 'a misstatement of a material fact. . .' ".

While the "going price" for the Essex stock in 1961 had many attributes, the critical attribute is the nondisclosure that the "going price" maintained by Essex was raised from time to time but was *never decreased.*

Any consideration of the transaction between petitioners and Essex without considering the "floor" characteristic of the "going price" would be like considering an apple pie without considering the apples. Yet, the Circuit Court neither considered this nondisclosure in the opinion nor upon the petition for rehearing.

Petitioners submit that the existence of a floor characteristic to a corporate management maintained "going price" is a fact that management not only must reveal to its shareholders, but is also a fact that would be material as a matter of law.

It is just impossible to conceive of any reasonable investor who would not consider this important to a securities transaction decision.

This case offers to this Court the opportunity to check the inroad of the philosophy of *caveat emptor* back into securities transactions. This case offers the opportunity to reaffirm the fundamental purpose of securities legislation to advance a philosophy of full disclosure.

2. The decisions below deserve the attention of this Court because the decisions below substituted a judicial appraisal of the transaction for an informed decision by the Petitioners.

Both the Circuit Court and the District Court placed major emphasis upon the circumstance that Essex executives and other informed insiders sold Essex stock for the same "going price" near the time of the Petitioners' transaction. Then the courts below proceed to the conclusion

that since informed shareholders sold some of the same stock at the same price, it would follow that a "detailed knowledge" of the "going price" would not have affected the choice of action of a reasonable person in the position of the Petitioners.

Such reasoning is not only illogical, but dangerous to every outside shareholder.

In *Mills v. Electric Auto-Lite Company*, 396 U.S. 375 (1970), this Court considered a directly analogous situation involving proxy violations. There the asserted wrong was that a corporate merger had been accomplished through the use of a proxy statement that was materially false or misleading. This Court held that a judicial appraisal of the merger's merits could not be substituted for the actual and informed vote of the shareholders.

That same principle should apply here because a judicial appraisal based upon contemporaneous stock sales should not be substituted for the nondisclosure to the Petitioners of important facts about the "going price."

The Circuit Court decision establishes a dangerous precedent. Any corporate management could point to some contemporaneous sales of stock by informed insiders as an excuse not to convey important information to outside shareholders. Moreover, other insiders may be considering the same information important to prefer their current position or to endeavor to acquire more stock.

Indeed the Essex management personnel who had knowledge of the "floor" characteristic of the "going price" as a class were aggressively acquiring more Essex stock during this same period of time.

The practical effect of the precedent established by the Circuit Court is to diminish the philosophy of full dis-

closure. Such a precedent can only be checked by this Court restating here the principle that there should be no substitute for a required disclosure.

3. The Petitioners were denied the right to trial by jury guaranteed by the Seventh Amendment to the Constitution of the United States.

The pre-trial proceedings in this case were marked by the determined efforts of the defendants to eliminate the issue of whether the defendants had violated S.E.C. Rule 10b-5. Following an evidentiary hearing, the District Court held that the use of a telephone in Fort Wayne, Indiana, in 1960-1961 was not the use of an instrumentality of interstate commerce because such telephone was not part of the Bell long distance system. The district court ordered petitioners to file amended pleadings eliminating the cause of action based upon violation of S.E.C. Rule 10b-5.

Then the defendants moved to strike the petitioners' demand for trial by jury, which the District Court granted.

Since the jurisdictional ruling was wrong, the striking of the jury demand was equally wrong.

This chain of events caught the petitioners upon the proverbial whipsaw because the District Court had precluded the right to a jury trial upon a violation of S.E.C. Rule 10b-5 where the relief sought is rescissional damages, *cf. Myzel v. Fields,* 386 F.2d 718 (8th Cir. 1967).

Then, during the trial, it was discovered that the defendants had been in possession all along of information which was a basis for federal jurisdiction.

The Circuit Court agreed wth the Petitioners that *Beacon Theatres Inc. v. Westover,* 359 U.S. 500 (1959) and *Dairy Queen Inc. v. Wood,* 369 U.S. 469 (1962) stood for

the proposition that the right to the trial by jury of a legal claim cannot be denied because the same issues are necessary to the determination of an equitable claim.

But then the Circuit Court cites the doctrine of election of remedies and concludes that petitioners had no right to a jury trial at the time the jury demand was stricken. This ignores the circumstance that the District Court *erred* in striking the cause of action based upon violation of S.E.C. Rule 10b-5.

The Circuit Court concluded upon two notes.

First, the Circuit Court implies that petitioners' counsel should have moved the District Court at some stage to impanel a jury. But the District Court did not reinstate the Rule 10b-5 cause of action until after the trial was over. Between the time when the 10b-5 cause was stricken and the filing of the findings of fact and conclusions of law, petitioners just didn't have a 10b-5 cause of action upon which to request a jury.

Second, the Circuit Court holds that all the foregoing wouldn't matter anyway, because the evidence failed to raise issues of fact sufficient to go to the jury. The subject of the evidence was discussed in parts one and two of this Petition. But the petitioners also had the right to have the jury evaluate the credibility of the witnesses and the weight to be attached to the evidence. Certainly the totality of the evidence raised issues of fact sufficient to go to the jury.

It is submitted that the most significant observation by the Circuit Court is the following:

> But for the election under operation of state law and the fact that the Federal claim had been stricken, we would regard the claim of abridgment of the right to

trial by jury as presenting a substantial question. . . Petitioners agree.

To paraphrase; but for the *error* of the District Court in initially striking the federal claim (violation of S.E.C. Rule 10b-5). Petitioners had the right to a trial by jury.

The decisions below deserve the attention of this Court because this case illustrates how a party can be deprived of a constitutional right by a series of procedural steps.

Step 1. Upon motion, a legal cause of action to which attaches the right of trial by jury is stricken from the pleadings.

Step 2. Upon motion, the demand for trial by jury is stricken based upon the ruling of the court at *Step 1.*

Step 3. The case proceeds to trial without a jury. During the trial, more evidence is adduced which bears upon the ruling at *Step 1.*

Step 4. After the trial, the court reinstates the cause of action stricken at *Step 1.*

Step 5. Then the trial court rules against the party which had demanded a trial by jury upon the merits.

While *Step 4* may cure the error at *Step 1, Step 5* is certainly no substitute for the trial by jury that was lost at *Step 2.*

This procedure deserves the attention of this Court because it illustrates how a party can be effectively deprived of the Seventh Amendment right to trial by jury.

SUMMARY AND CONCLUSION

The decisions below advance a pholosophy of *caveat emptor* in securities transactions at the expense of the philosophy of full disclosure.

The procedures applied below deprived the Petitioner of the Seventh Amendment right to a trial by jury.

The grant of the Writ of Certiorari is therefore requested.

Respectfully submitted,

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and

ROBERT W. JONES

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APPENDIX A

Findings of Fact and Conclusions of Law of District Court

(Filed August 23, 1972)

No. C 66-814

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

BERTHA ARBER, *et al.*,
Plaintiffs,

v.

ESSEX WIRE CORP., *et al.*,
Defendants.

LAMBROS, *District Judge*

FINDINGS OF FACT

1. At the time the complaint herein was filed plaintiff Ann Arber Broek was a resident of the State of New Jersey. Broek is the daughter of Herman and Bertha Arber. (Complt., ¶¶ 1-2). Prior to her marriage her maiden name was B. Ann Arber. Throughout these findings, "Broek" will be used to designate plaintiff although some of the transactions described occurred before her marriage. Broek has two brothers—Ralph and Arthur.

2. Defendant Essex Wire Corporation (hereinafter "Essex") is a Michigan Corporation with its principal

place of business in Fort Wayne, Indiana (Complt., ¶3). It is licensed to do business in the State of Ohio as a foreign corporation.

3. Defendant Walter F. Probst is the Chairman of the Board of Directors and Chief Executive Officer of Essex. Probst has held this position with Essex since 1962. From 1959 to July of 1962, Probst was President and Director of Essex. Probst was and is an attorney admitted to the bars of the State of Michigan and the State of Indiana. At the time the complaint was filed, Probst was a citizen of the State of Indiana (Complt., ¶3). Service of the complaint herein made on Probst was accomplished solely by mail.

4. Plaintiff Bertha Arber died during the pendency of this action. Bertha Arber was the widow of Herman Arber and mother of plaintiff Ann Arber Broek. At the time the complaint was filed, Bertha Arber was a citizen of Indiana (Complt., ¶1). Before the filing of the Second Amended Complaint, Bertha Arber moved to the State of New Jersey wherein she resided until her death. Ann Arber Broek is executrix of the estate of Bertha Arber. Ann Arber Broek prosecutes the claims of Bertha Arber in her representative capacity.

5. Addison Holton founded Essex in 1930. Holton served as the Chairman of the Board of Directors and Chief Executive Officer of Essex until his retirement from the company in 1962 (Tr., pp. 2-5).

6. At the time of the transaction which forms the basis for this action, 500 shares of Essex common stock were held in the name of B. Ann Arber, Trustee and 25 shares were held in the name of Bertha Arber. The entire 525 shares were originally purchased by Herman Arber as part of an Essex program to allow employees to buy

stock (Tr., p. 704). Herman Arber was a long time employee of Essex who served as a Plant Manager for Essex until the time of his death in the year 1948 (Tr., pp. 28, 77).

7. By reason of the provisions in Herman Arber's will, the 525 shares of Essex stock which form the basis for this action were bequeathed as follows: Bertha Arber, Herman Arber's widow, was bequeathed a life estate in 500 shares of stock and Ann Arber Broek was bequeathed a remainder interest in the shares. Bertha Arber was bequeathed 25 shares outright. Since Broek was a minor at the time of Herman Arber's death, the 500 shares of Essex stock was transferred to Bertha Arber guardian for B. Ann Arber (DX T).

8. In the early 1950's, Mrs. Bertha Arber and Ann Arber Broek retained Arthur W. Parry, a Fort Wayne, Indiana attorney, for the purpose of preserving their ownership interest in the 500 shares of Essex stock. At this time Broek was nearing her majority. Parry in turn communicated with defendant Probst regarding the most appropriate method of reflecting stock ownership in view of the provisions of Herman Arber's will. Probst suggested to Parry that problems might in the future arise under Indiana law regarding the establishment of a life estate in items of personal property such as stock. Probst suggested that a preferable way to accomplish the result expressed in Herman Arber's will would be for Ann Arber Broek to hold the 500 shares of Essex stock in trust as trustee for Bertha Arber. This trust arrangement would enable Ann Arber Broek to obtain full ownership rights upon the death of Bertha Arber without the legal complications previously described. Parry agreed that Probst's suggestion was the appropriate legal way to proceed (DX T; Tr., pp. 685-687).

9. During his conversation with Parry, Probst inquired as to whether the Arbers had any desire to sell the Essex stock to Essex for a price of $100 per share. $100 per share was the price at which Essex stock was then being traded (DX T; Tr., pp. 685-687).

10. On July 13, 1951, Parry responded to Probst by letter (DX A) in which he on behalf of the Arbers declined Essex' offer. Parry noted in his letter that Bertha Arber had "such a high regard for the management of Essex Wire Corporation that she feels that investment in that corporation would be as sound as in any other company that she can think of." In addition, Parry informed Probst that Mrs. Arber's decision not to sell was in part based upon the heavy federal income tax which would result from the sale owing to the fact that the shares had been appraised in the estate at the figure of $65 per share (Tr., pp. 686-687).

11. On June 28, 1951, Mr. Merl Barnes, a law partner of Mr. Parry, wrote to Mr. Probst (DX B), notifying Probst that Ann Arber Broek (then B. Ann Arber) had attained her majority on June 14, 1951. Barnes requested assistance in effecting a transfer of title to the 500 shares of Essex stock on Essex' books to a trust as outlined in ¶8 above.

12. On December 6, 1951, the Allen Superior Court No. 2 of Allen County, Indiana, ordered that the 500 shares of Essex stock be transferred from Bertha Arber Guardian to B. Ann Arber (Ann Arber Broek) as trustee for Bertha Arber (Exhibit DX T). As a result of the aforementioned court order, the 500 shares of Essex stock were transferred into a trust in which Ann Arber Broek was designated as trustee for Bertha Arber. The provisions of the trust provided that Bertha Arber would receive

the income from dividends paid on the 500 shares of Essex stock during her lifetime and that upon Bertha Arber's death the ownership of the 500 shares would be completely vested in Ann Arber Broek.

13. In 1959, Probst telephoned Bertha Arber and Ann Arber Broek. Both the Arbers and Probst then resided in Ft. Wayne, Indiana. During this conversation, Probst indicated that he had been informed that the Arbers were interested in selling their Essex stock. The Arbers replied that although they had not considered selling their Essex stock they would like to discuss the matter in person with Mr. Probst. Thereupon, a personal meeting was arranged among Probst, Bertha Arber and Ann Arber Broek at Mr. Probst's office in Ft. Wayne, Indiana (Tr., pp. 26-27).

14. Shortly thereafter, the personal meeting among Probst and the Arbers was held in Mr. Probst's office. During this meeting Probst indicated to the Arbers that Essex was doing well and showed them financial statements. On behalf of Essex, Probst offered to purchase their Essex stock for a price of $250 per share. The meeting ended with the understanding that the Arbers would contact Probst if any interest in selling developed (Tr., p. 27).

15. Later, in 1960, Addison Holton and Ralph Arber had a conversation at the former's office in which Holton raised the subject of whether Ralph Arber would advise Bertha Arber and Ann Arber Broek to sell their stock for Two Hundred Fifty Dollars ($250.00) per share. He responded that he would not because he considered the stock to be more valuable.

16. In early 1961, Ralph Arber, while in Detroit, Michigan, received a telephone call from Probst in Fort

Wayne, Indiana in which Probst requested him to come to Fort Wayne to discuss a possible sale of his business to Essex and a possible sale of the Essex stock owned by Bertha Arber and Ann Arber Broek.

17. In response to Probst's telephone invitation, Ralph Arber in early 1961 went from Detroit, Michigan to Fort Wayne, Indiana where he and Probst discussed a possible sale of his business to Essex and a possible purchase by Essex of the Essex stock owned by Bertha Arber and Ann Arber Broek. Probst requested Ralph Arber to advise them to sell their stock for Two Hundred Fifty Dollars ($250.00) per share. Ralph Arber declined because he considered the stock to be more valuable. Nor did Probst and Ralph Arber reach any agreement with respect to Essex purchasing Ralph Arber's business.

18. Ralph Arber advised his sister and mother, not to sell the Essex stock in response to a request from her for advice.

19. Later, but still in early 1961, Ann Arber Broek contacted Probst and inquired if Essex was still interested in purchasing the Essex stock which they held (Tr., p. 30).

20. Shortly thereafter, a second meeting was held in Probst's office in Ft. Wayne, Indiana between Broek and Probst. The discussion at this meeting again involved the possibility of the Arbers selling their stock to Essex, in addition to general comments concerning the operations and prospects of Essex. Probst indicated that Essex was continuing to do well and that the Arbers were fortunate in waiting because the price then being offered by Essex for stock had risen from $250 to $350 per share. Broek told Probst that she wished to discuss this offer with members

of the family and would subsequently inform Probst of their decision (Tr., pp. 62-63, 185).

21. Thereafter, Ann Arber Broek telephoned Probst and informed him that after family discussion they had decided to sell their Essex shares for the previously offered price of $350 per share. During this conversation, a meeting was arranged at which time the Arbers were to present the stock certificates to Mr. Probst and the payment checks were to be tendered.

22. Sometime in May 1961, plaintiff Broek and Bertha Arber appeared at Probst's office in Ft. Wayne for the purpose of consummating the sale of Essex stock to Essex. During this meeting, both Bertha Arber and plaintiff Broek executed assignments to Essex of the Essex certificates representing 500 and 25 shares respectively of Essex stock. The Arbers received checks representing the purchase price for the 525 shares of Essex stock at a price of $350 per share for a total of $183,750 (Tr., pp. 90-91).

23. In order to consummate the sale, the consent of Ralph Arber and Arthur Arber to the sale by means of assignments of their interest to Essex was required. In this regard, Ralph Arber received through the mail the assignment attached to the stock certificate (PX 9, DX e). He did not receive it from Bertha Arber or Ann Arber Broek, but from Essex or some lawyers. Ralph Arber signed the assignment and mailed it from Detroit, Michigan, to Essex at Fort Wayne, Indiana, as a part of the transaction.

24. The 525 shares of Essex stock purchased by Essex were retained by Essex and subsequently retired. At no time after acquiring the Arber shares were these shares transferred to defendant Probst or any other individual (Tr., p. 680).

General Availability of Information Concerning Essex to Its Shareholders

25. Essex financial statements and books and records were always available to shareholders who requested them (Tr., p. 681). Essex never denied any shareholder requests for financial information or financial statements (Tr., p. 681).

26. Annual meetings of Essex were held on the third Saturday in April, at which time all available financial information was presented for shareholder inspection (Tr., pp. 634-637).

27. All shareholders including the Arbers received notices and proxies for these meetings (Tr., pp. 634-637).

28. Although the Arbers received such notices and proxies each year, they did not return their proxies for years other than 1954 and 1955 (Dx. HH, JJ; Tr., pp. 634-636).

29. Although they had received notices of Essex' annual meetings for years 1949-1961, at no time did the Arbers attend any annual meetings of Essex, including the April 1961 meeting (Tr., p. 86).

30. Mrs. Arber was provided in 1948 with an Essex earnings statement which she had requested (Tr., pp. 681; Dx T). This information was apparently requested for the purpose of valuing the Essex stock in Herman Arber's estate. The Essex stock in Herman Arber's estate was valued at $65.00 per share (Dx A).

31. Earnings, book value, earnings per share and other financial data are routinely available in financial statements. All purchases of shares by a corporation would be reflected by changes in the numbers of outstanding shares contained on balance sheets.

32. The agreement between Essex and Holton concerning the repurchase of his Essex shares at death, the Essex employee stock purchase plan and loans made thereunder were approved by Essex directors and shareholders. Thus, an examination of the Essex minute books would have revealed the details of these transactions (Tr., pp. 637-638, 671-672).

33. Plaintiff's witness, Ralph Arber, testified it was common knowledge that Addison Holton readily provided information to shareholders and employees of Essex upon request. Holton was always available to talk to anyone concerning Essex (Tr., p. 575).

Full Information Concerning Essex Was Known or Available to Plaintiff At the Time of Plaintiff's Stock Sale

34. At the time of the sale plaintiff Broek was a very well educated, relatively experienced woman. She had achieved a Bachelor of Arts and Masters degrees from Indiana University. She had lived independently and studied in New York City for two more years, and had been involved in the operation of a small business in New York City for a year (Tr., pp. 155-158).

35. Plaintiff and her mother knew a great deal about Essex. For example, they were fully aware that Essex was closely-held, that the stock was not widely traded, that Mr. Holton was founder of the Company, and that Mr. Probst held a senior position in the Company (Tr., pp. 191-192).

36. Mrs. Broek knew there were differences between public and private companies and had discussed with her mother the fact that Essex stock might some day go public thereby resulting in its greater marketability. Mrs. Broek

was also aware that increased marketability creates higher stock prices. In short, she knew that if Essex "went public" its stock could be worth much more (Tr., pp. 207-210).

37. Mrs. Broek knew that Essex had an active program designed to permit officers and executives of Essex to buy stock (Tr., pp. 225-226). In addition she, of course, knew her father had purchased stock as an employee (Tr., p. 226).

38. Plaintiff Broek knew at the time of the sale that Essex maintained financial statements reflecting the entire history of Essex' operations, including how much money Essex was making and the number of outstanding shares (Tr., p. 203).

39. At no time did Broek either ask for financial statements or ask a single question about the operations or financial performance of Essex (Tr., p. 204). Significantly, Mrs. Broek and her mother received notice of the Annual Meeting of Essex which was held the third week in April, 1961, only a few weeks prior to the time of the sale (Tr., pp. 634-637). Again, plaintiff declined to attend the meeting and thus failed to avail herself of information there available (Tr., pp. 636-637).

40. Plaintiff's lack of interest in the financial performance of Essex is shown by her admission that she routinely ignored notices of annual meetings and proxies mailed her (Tr., p. 86).

41. Plaintiff personally knew Mr. Roesler, Essex' Treasurer, Mr. Phillips, its Vice President (who had furnished an earnings statement to Mrs. Arber in 1948 (DX T)) and Mr. Shea, the retired Vice Chairman of the Board (Tr., pp. 192-193). Mrs. Broek also knew many other individuals who were in a position to have advised her with

regard to selling the stock and analyzing financial statements if she so desired.

42. Mrs. Broek was aware there were attorneys and accountants in Ft. Wayne with the skill and expertise to advise her regarding the sale (Tr., pp. 199-202). The Arbers had previously retained attorney Arthur Parry to advise them concerning the transfer of their Essex stock. In addition, a Ft. Wayne lawyer named Fruechtenicht was regularly employed by the Arbers in preparing their tax returns (Tr., pp. 202-203).

Advice Given The Arbers By Ralph Arber (Brother of Plaintiff)

43. Of paramount importance is the knowledgeable advice given to plaintiff and her mother by Mrs. Broek's brother, Ralph Arber. The record establishes that Ralph Arber was a competent and experienced businessman. After being employed by Essex, he started his own business in competition with Essex in 1956 and sold the company just 13 years later for over $160,000 (Tr., p. 596). Ralph Arber was intimately familiar with financial statements and security valuation as reflected by the fact that he personally handled the negotiations for the sale of his private company for shares of stock (Tr., pp. 596-597). He also was familiar with the Essex organization, having been long employed by Essex prior to establishing his own business. Ralph Arber understood the closely-held, non-public structure of Essex. He knew Holton personally as "a very available guy" (Tr., pp. 613-614). He testified that he had traveled through the plants, knew them well and formed the opinion that the plants were "great" (Tr., pp. 613-614).

44. Based on his knowledge and his business experience Ralph strongly advised his mother and sister *not* to sell the stock. He told them:

> "I knew them and I thought it was a real gung-ho outfit. . . . I thought they were the greatest with Walter and the rest of them in there, this place was going to go." (Tr., pp. 607-608).

Ralph Arber told Bertha Arber that Essex was a good company, describing Essex as "real comers and goers" (Tr., pp. 614-615). For these reasons, he advised his mother that Essex was a "helluva company", was "going to go a long way" and that if the stock ever went public it would be very valuable (Tr., pp. 614-615; 607-608). Although Ralph Arber was not aware the price offered by Essex had increased from $250 to $350, he would have advised against selling at *any* price (Tr., p. 610).

The Decision by the Arbers to Sell

45. According to plaintiff the decision to sell occurred at family discussions which included Ralph Arber (Tr., pp. 186-187). Ralph Arber steadfastly opposed selling because of his belief in the future prospects for Essex as previously stated.

46. The Court concludes that neither the financial condition of Essex nor the company's future prospects were material considerations which influenced the Arbers' decision to sell their Essex stock. Moreover, the disclosure of the alleged non-disclosed facts would not have been relied upon by the Arbers in deciding whether to accept Essex' offer of $350 per share. These conclusions are clearly demonstrated by the fact that plaintiff and her mother ignored the knowledgeable counsel of Ralph Arber who described Essex' future prospects in the most glowing of terms.

47. The decision to sell was based on the desire of the Arbers to reinvest some of the money at a greater

return and to use the rest for a European trip (Tr., pp. 211-213). Thus, despite Ralph Arber's counsel against selling, Mrs. Broek and her mother *did not even consider* that the stock had increased from $250 to $350 in the space of a year and might further increase in price to $400 or even $1,000 per share (Tr., pp. 213-214). As Mrs. Broek put the matter: "We were not far-sighted" (Tr., p. 213).

48. Accordingly, even if the Arbers had possessed the allegedly concealed facts, they would not have acted differently. Further support for this conclusion is found in plaintiff's testimony that financial data such as earnings per share, net asset value and price-earnings ratio had virtually no meaning whatever to her in 1961 (Tr., pp. 215-216).

49. The various financial facts allegedly concealed from plaintiff were reflected in the company's financial statements that were available to the Arbers. Such facts are at best subsidiary factors from which an opinion might be formed as to the ultimate conclusion concerning future prospects of Essex. On the record of this case, it is unreasonable to conclude that these subsidiary factors were either material or would have been relied upon by plaintiff when plaintiff herself expressly ignored and rejected the admittedly knowledgeable advice given by her own brother concerning the ultimate issue of Essex' future prospects.

Plaintiff Has Failed to Prove The Existence of A Plan By Defendants To Repurchase Essex Stock

50. Plaintiff has asserted the existence of a concealed plan on behalf of Essex and Probst to cause Essex to repurchase its own shares for the purpose of increasing the value of the remaining outstanding shares. Plaintiff further alleges that this secret plan was conceived in the

year 1959 and therefore existed in May of 1961. The Court finds that plaintiff has failed to prove the existence of such a plan.

51. Plaintiff asserts that the Essex employee stock purchase plan was conceived for the purpose of furthering the alleged concealed plan described above. However, the evidence establishes that the employee stock purchase plan was established in the year 1950, some nine years before the repurchase plan was allegedly conceived.

52. Moreover, the stock purchase plan was no more than a variation of the familiar corporate stock option plan. Under the Essex plan, the Company loaned employees money interest-free to buy shares. The shares were held as collateral for the employee's note. If the employee left the Company or died before paying off the shares, they were retained by the Company. The economic effect was, thus, very similar to a typical stock option plan in which the employee incurs no obligation unless the option is exercised (Tr., pp. 650-652).

53. The Essex stock purchase plan and loans made thereunder were approved by the Board of Directors and the shareholders at the annual meetings (Tr., pp. 636-638). The purpose of the plan, again similar to stock option plans, was to encourage employees to have an ownership interest in the Company in order to give them incentive to improve its operations for the benefit of all shareholders (Tr., pp. 702-703).

54. Shares were sold under the plan to over 50 employees ranging from defendant Probst and other executives down to accountants, salesmen and manufacturing employees (Tr., pp. 25, 657-661).

55. The fact that a 25% reduction in the Company's average outstanding shares occurred between 1959 and

1961 does not establish the existence of a "plan" to increase value by repurchasing shares. Over the years Essex management determined that it was in the best interests of all Essex shareholders to use a portion of Essex capital to buy shares from shareholders who desired to sell, thereby creating some liquidity in an otherwise unmarketable stock and giving shareholders who desired it a chance to realize the value of their stock (Tr., pp. 670-671).

56. Moreover, a reduction of 25% in average outstanding shares during this period provides no logical basis for plaintiff's contention that there was a plan to increase vastly the value of the Company's stock by repurchasing shares. In fact, the 25% reduction in outstanding shares from 1959 to 1961 resulted in increasing earnings per share only from $1.04 to $1.18 (Px 1, p. 5) which was an insignificant 6.5% annual earnings increase per share over a two-year period. Earnings per share in fact *declined* in 1960, at a time when Mrs. Broek claims a plan existed to *increase* earnings per share. It is illogical to suggest that a claimed stock manipulation allegedly designed for the purpose of causing, and resulting in, vast increases in stock value is evidenced by repurchases which created a mere 6.5% annual gain in earnings per share over a two year period.

57. Of the 25% reduction in average outstanding shares from 1959 to 1961, almost 1/3 came from sales by these persons who would necessarily be privy to such an alleged plan. For example, Messrs. Kammer and Shea who sold stocks in this period were directors and high level executives of Essex with full knowledge of all facts. Mr. Kammer was also the son-in-law of Mr. Holton, the then Chairman of the Board (Tr., pp. 642-648).

58. Likewise, the 1962 repurchase of 40% of the Company's shares from Mr. Holton does not support plaintiff's contentions. As the record shows, in 1953 Mr. Holton entered into a contract with Essex which required the Company to purchase Mr. Holton's stock at his death for 80% of book value. This agreement was approved by the Board of Directors and the shareholders (Tr., pp. 671-672). A settlement of Essex' obligations under the 1953 Holton agreement was negotiated in the summer of 1962. No evidence has been offered which even suggests that this negotiated settlement was part of a plan existing in May of 1961.

59. Mr. Holton's wife died at Christmastime 1961. In May or June 1962, considering his wife's death, his age, possible estate tax problems and his daughter's marital difficulties, Mr. Holton expressed a desire to negotiate a settlement of his agreement with Essex. Essex then borrowed $27 million from Metropolitan Life and purchased the Holton stock for $830 per share, which was roughly 80% of book in 1962 (Tr., pp. 672-673, 724-727).

60. The wisdom of this settlement of the Holton agreement from Essex' standpoint is apparent because Holton is still alive. Absent the settlement, Essex would today face a contingent obligation of nearly $75 million (Tr., pp. 674-675).

61. Nor does the 1963 dividend increase from $.02 per share to $.10 per share (adjusted for the two stock splits) provide support for plaintiff's case. No evidence has been offered which would indicate that Essex or Probst had knowledge in May of 1961 of a plan to increase dividends in 1963. Moreover, in light of the small amount of total dividend paid, even the new dividend was consistent with the view held since the inception of the com-

pany that capital should be used primarily for internal growth (Tr., pp. 727-728).

62. The most persuasive evidence refuting the existence of the stock repurchase plan alleged by plaintiff consists of contemporaneous sales by officers and directors of Essex, all of which involved a purchase price identical or similar to the price paid plaintiff (Dx AA). The existence of these sales are particularly important because each of the sales were made by persons who would necessarily be aware of the existence of any secret plan to repurchase shares as alleged by plaintiff. If these officers and directors were aware of a plan to increase stock value, their actions in selling at the lower Arber price are inexplicable.

63. The stipulated evidence (DX AA) reflects the existence of the following sales by Essex officers and directors:

	Sale Date	Seller	Purchaser	Number Of Shares	Price Per Share
	2/23/60	Roesler	Egger & Co.	100	$250
	6/07/60	Shea	Mike & Co.	6,000	$350
	12/23/60	A. F. Kammer, Jr.	International Wire	1,370	$350
	1/03/61	Holton	Various Essex Employees	950	$350
	2/03/61	Taft	Egger & Co.	40	$350
	2/21/61	Holton	Hirschman	50	$350
	3/28/61	Roesler	Egger & Co.	75	$350
Arber	6/02/61	Nolton	Harrison	29	$350
Sale	6/02/61	Holton	N.C. Kennedy and M.E. Kennedy	150	$350
	7/20/61	Probst	Egger & Co.	72	$350
	2/12/62	Roesler	Gunn & Co.	75	$375
	9/27/62	Probst	Various Essex Employees	2,925	$400

64. Mr. Roesler, who made a number of stock sales during this period, was Essex' Treasurer and chief financial officer in charge of preparing all financial statements and information. As reflected by Dx AA, Mr. Roesler sold the equivalent of 1/2 of his final holdings at the going price. Mr. Roesler was thoroughly familiar with all details of stock purchases by Essex and in fact was personally involved in virtually every transaction because as Treasurer he raised the money for each purchase and necessarily would have understood the going price and been aware of any "plan" to increase stock value (Tr., pp. 688-689). His sale of the equivalent of 20,000 shares at the going price paid the Arbers squarely refutes any notion of such a plan.

65. Mr. Shea, a director and Vice Chairman of the Board, who possessed more complete information about Essex than anyone except Mr. Holton, nevertheless sold his entire holdings in Essex—6,000 shares—to Essex in June 1960 for the same $350 per share price received by the Arbers (Tr., pp. 642-644). Mr. Shea sold his stock at that price despite the fact that he had an agreement (*identical* with Mr. Holton's) providing for sale of his stock to the Company at his death for 80% of book value (Tr., pp. 644-646). Thus, Shea indicated through his actions that he regarded the present value of his contract as equivalent to the Arber price.

66. Other individuals making sales as disclosed by defendants' Exhibit AA were Mr. Kammer, a director and Mr. Holton's son-in-law, who had full financial information (Tr., pp. 646-648); Mr. Holton, founder and Chairman of the Board of the Company; Mr. Taft, a prominent lawyer who was and still is the senior partner of the 50-lawyer Boston law firm of Herrick, Smith, Donald, Farley & Ketchum, and had been an independent outside director

for many years (Tr., pp. 653-655); and Mr. Probst himself. The Taft sale is particularly significant in that he was an independent corporation lawyer, was a trustee for other shareholders in Boston, had owned his shares for many, many years, had never been employed by Essex, and acquired none of his shares under the stock purchase plan (Tr., pp. 653-655).

67. Extremely persuasive that no plan existed is Mr. Probst's own sale of almost 3,000 shares to Essex employees for $400 per share 16 months after the Arber sale and only two months after the Holton repurchase at $830 per share. According to plaintiff, the Arbers' stock in May 1961 ranged in value from $700 to $1,000 per share and Probst knew the stock was worth much more than the $350 per share paid the Arbers (Pl. Br., p. 13). Thus, under plaintiff's theory, in selling 2,925 shares a year later for $400 per share, Probst knowingly gave away from $890,000 to $1,800,000. It is highly unlikely that Mr. Probst would devise a secret plan to increase stock value, defraud the Arbers, and then proceed himself to give away amounts of money many times greater than were involved in the Arber transaction.

68. Defendants' Exhibit AA thus is a free market "bench mark" to validate the "going price." Furthermore, the going price itself was arrived at after consideration of all relevant factors bearing on fairness, including the Company's strengths and weaknesses and at what price knowledgeable persons such as Mr. Taft would sell (Tr., pp. 68-69).

69. The evidence establishes that all directors and officers received the going price received by other sellers such as the Arbers (Tr., pp. 69-70). The 1962 settlement between Holton and Essex of Holton's 1953 agreement with the company which resulted in Holton receiving $830

per share for his 40% of the outstanding shares of Essex is not comparable for the reasons set forth in Finding ¶ 58.

70. There is no evidence that any sale reflected in defendants' Exhibit AA was made by an individual without full knowledge of all relevant facts. There is no evidence that any of these sales involved coercion or any other unusual facts. Moreover, sales by Mr. Probst and others to Essex and to executives such as Essex' Controller and Vice-President-Finance (Tr., p. 658), were indisputably made to purchasers with full knowledge of all facts.

The Arber Price Was Fair And Reasonable

71. The best evidence of the value of Essex stock in May 1961 is provided by contemporaneous transactions between sellers and buyers with knowledge of all relevant facts.

72. Plaintiff's expert, Professor Stone, testified that the fair value of a share of stock

> "involves the determination of the value of that share as it would be arrived at by—on a voluntary basis, without any type of compulsion, openly, with full knowledge as to the facts surrounding the conditions reflecting on market price, by a competent buyer and a competent seller." (Tr., p. 104.)

Sales by Essex' directors to the Company and employees such as its financial Vice President who had total financial knowledge fit this standard. Based upon these previously described sales, the Court concludes that $350 per share was a fair and reasonable price for the Arbers' Essex stock in May 1961.

73. The reasonableness of the $350 price is supported by the testimony of defendants' expert, Mr. Claire V. Hansen. Mr. Hansen utilized three methods to reach and verify his conclusion that the $350 price was fair. He first looked at 1961 using the only information available to an investor as of that time. He noted there was a decline in earnings of over 25% in 1960 and that the Company was extremely dependent upon the Ford Motor Company account because profits from Ford exceeded 50% of Essex' net earnings. Further, he considered the fact that Essex was in the highly cyclical wire and automotive industries. He then selected four companies which either were likewise tied to the automotive industry or were wire suppliers, and noted that each of these four companies' earnings declined in 1960. Similarly, in the first six months of 1961 these four companies showed lower earnings with a trend downward. Mr. Hansen then looked at concurrent trends in market value for 1959, 1960 and the first five months of 1961 which significantly showed that the open market prices for the shares of these comparable companies declined as their earnings declined. Mr. Hansen pointed out that an analysis of price-earnings ratios and market valuations when public companies are reporting at peak earnings will provide a basis for a judgment as to how a non-marketable company such as Essex should be valued after a decline in earnings (Tr., pp. 438-445, 452-453).

74 In addition to the data on these comparable companies (defendants' Exhibits CC, DD, EE), Essex' dependence upon Ford, the cyclical nature of Essex's business and its earnings down-trend, Mr. Hansen also considered the depressing effect of the 1953 Holton agreement. He regarded this agreement as a "very substantial detrimental factor" because it restricted the amount that could be paid in dividends and created a serious continuing problem

in Essex' capital structure because the company never knew at what point it would have to meet the obligation (Tr., pp. 448-449).

75. Mr. Hansen also considered the fact that the lack of marketability of Essex stock required the application of a substantial discount from the price a publicly traded stock would command. Similarly, the small size of the Arber holding of 525 shares required a discount because an investor would not pay the otherwise going price for such a small holding which lacked control and liquidity, in a corporation with no expectation of going public (Tr., pp. 449-450). Based on all the foregoing factors, Mr. Hansen concluded that the sale price per share of $350 was fair and reasonable. The Court concurs in the reasoning of Mr. Hansen.

76. Mr. Hansen further concluded that a reasonable sales price range for Essex stock was $350 to $400 per share (or a price-earnings ratio 5-5.7 based on 1960 earnings of $70), considering the market prices of comparable companies and the contemporary sales by Essex' top management at $400 a share within a year of the Arber sale. This conclusion was supported by the fact that in 1959, a peak earnings year for Essex, comparable companies such as Eaton and Borg-Warner sold at 7 and 8 times earnings on the New York Stock Exchange. In comparison, the Arbers sold their stock in a private company with many problems in a period of declining earnings at five times earnings. The reasonableness of the Arber price was demonstrated by the foregoing (Tr., pp. 450-453).

77. Mr. Hansen also used an alternate method to value the Essex stock. He noted the Company went public in 1965 at 9.5 times earnings. The problem raised by the Holton obligation had then been eliminated, depen-

dency upon Ford had been reduced and the stock was then public and marketable. Moreover, in 1965 the Company had just completed a year when earnings were up very sharply (27% over the prior year); whereas in May 1961 an investor would have been looking at the 1960 earnings which had declined by more than 25%. By 1965 the dividend yield had also increased 217% since the Arber sale from 0.9% to 2.85%. Considering all these facts and applying a 25% discount for lack of marketability to the 1965 public price-earnings ratio of 9.5, Mr. Hansen concluded that in 1961 an investor like the Arbers, selling at a 5 to 5-1/2 price-earnings ration, or $350 to $400 per share, obtained a fair and reasonable price (Tr., pp. 457-463). The Court concurs in the reasoning of Mr. Hansen regarding this second method of stock valuation though this approach is less persuasive since it deals with an after-the-fact analysis.

78. The price-earnings ratio for the $350 per share Arber price was 5 times 1960 earnings of $70. Mr. Probst testified that as of May 1961 the only available data were 1960 earnings and preliminary first quarter 1961 figures which showed no different trend from 1960 (Tr., pp. 629-630). However, as late as 1966 after the public offering and after all of the problems confronting the Company in 1961 had been affirmatively resolved, Essex stock sold on the New York Stock Exchange at less than 5 times earnings (Tr., pp. 540-541). In 1970, the stock was selling at 5.1 times the previous three years average annual earnings (Tr., pp. 557-559). These further facts support the reasonableness of the Arber 1961 price of 5 times 1960 earnings.

79. The analysis of Essex stock value provided by plaintiffs' expert Dr. Stone is less persuasive than that offered by Mr. Hansen for a number of reasons. Dr.

Stone admitted that he did not know any companies directly comparable to Essex and could not name a single Essex competitor (Tr., p. 322).

80. Dr. Stone was unaware of the products the company manufactured, even though he acknowledged that anyone valuing the company at the time of the transaction would have considered these facts *essential*. He admitted that if he had read the 1965 Prospectus (Px 1), his *only* source of data, he would have known what business Essex was in (Tr., p. 329).

81. Dr. Stone admitted that he had merely scanned and not read the 1965 Prospectus although his opinion was solely based upon it (Tr., p. 363). He did not read the footnotes to the financials on which he relied (Tr., pp. 359-361). He was not aware that Essex' earnings actually *declined* during the period of the claimed "plan" from $8 million in 1959 to $7 million in 1963 (Tr., p. 363) although this fact is plainly stated in the Prospectus.

82. Although Dr. Stone admitted that he did not consider Essex a growth company, he based his opinion on a W. E. Hutton Company publication entitled "Yardstick For Appraising Growth Stocks" (Tr., p. 339).

83. Dr. Stone disregarded the 1959 figures available in the 1965 Prospectus (Px 1) and used 1960 as the base year for his theory, although he admitted that he usually likes to consider as long a time period as possible (Tr., p. 350). By using 1959 as a base year, Essex would have shown a negative growth rate rather than the positive rate arrived at by Dr. Stone.

84. In concluding that Essex had a "positive growth rate," Dr. Stone looked solely at earnings per share (which increased substantially due to the company's repurchase of 40% of its stock from Mr. Holton in 1962) and ignored

the fact that the Company had no real earnings growth, earnings having declined from $8,772,000 in 1959 to $7,408,000 in 1963 (Px 1; Tr., pp. 361-363).

85. Dr. Stone's opinion and his conclusions were based solely on hindsight. Stone's testimony was often hedged in terms of what he "assumed" (Tr., pp. 352, 343, 365) or what "seemed" to be the case (Tr., pp. 128-129). Thus Dr. Stone implied the existence of "plans" in May 1961 from the fact that growth later did occur (Tr., pp. 121-122). His conclusion was based on his assumptions that "growth results only from plans" (Tr., p. 327) and that "Probst was a good businessman." (Tr., pp. 345-346). He *assumed* the Company was going to "do something" with the retained earnings to make the stock worth more because "I will give them credit for being responsible" (Tr., pp. 343-344).

86. Professor Stone concluded that Essex stock was worth $940 per share in May of 1961 (Tr., pp. 140-141). This conclusion is inconsistent with the repurchase by Essex of Holton's shares for a price of $830 per share some 15 to 16 months later. The repurchase of Holton's shares resulted from the settlement of a prior contract negotiated in 1953 providing for the purchase by Essex at Holton's death of his Essex shares at 80% of book value (Tr., pp. 19, 671-675). However, Professor Stone conceded in his testimony that it was to be expected that the Holton price would exceed the reasonable value of Essex shares for two reasons. First, Holton had entered into a 1953 agreement which required the company to purchase his shares at 80% of book value upon his death (Tr., pp. 334-335). Second, Holton's stock ownership represented control of Essex. As Professor Stone acknowledged, the control of a corporation normally commands

in the marketplace a premium over and above the price at which a lesser number of shares would be purchased (Tr., pp. 398-399).

87. The validity of Professor Stone's estimate of Essex stock value in May of 1961 is also subject to question since he ignored prices of contemporaneous stock sales by Essex officers and directors at a price of $350 per share. Although Professor Stone acknowledged that contemporaneous sales provide the best indicator of stock value (Tr., pp. 104-105), he gave no reasons why the sales reflected in Defendant's Exhibit AA were not considered by him (Tr., pp. 366-398).

88. As plaintiff alleges, she became aware of the claimed fraud of defendants in January 1965 when she and her husband received and analyzed Essex' Prospectus (Complt., ¶ 9; Tr., pp. 92-94).

89. Plaintiff waited 22 months after discovering the allegedly fraudulent acts of defendants before filing this action on November 8, 1966. During this 22 month period neither plaintiff Broek nor Bertha Arber notified defendants of their intention to rescind their sale of 525 shares of Essex stock. Plaintiff has offered no evidence to explain why she delayed for nearly two years before seeking rescission of the May 1961 sale.

90. During the period from January 1965 to November 9, 1966, the market price for Essex stock as reflected by purchase and sale transactions on the New York Stock Exchange rose from $25.50 per share to $40.75, an increase of approximately 60% (Dx U).

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the cause of action under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b).

a. Section 10(b) requires that the transactions on which the claim is based involve "use of any means of instrumentality of interstate commerce or of the mails or of any national securities exchange".

b. The mails were used as a part of the transaction in that an assignment form was mailed to Ralph Arber to sign, which he did sign, and which he mailed to Essex.

c. An instrumentality of interstate commerce was used in that Probst telephoned Ralph Arber by long distance from Fort Wayne, Indiana, to Detroit, Michigan to request Ralph Arber to come to Fort Wayne to discuss a possible sale of the stock which is the subject of this action. This involved the use of an instrumentality of interstate commerce.

d. The purely intra-state phone calls between Probst and Bertha Arber and Ann Arber Broek did *not* involve an instrumentality of interstate commerce. (See the memorandum opinion and order of this Court filed on March 4, 1971).

2. This Court has jurisdiction over the state cause of action by virtue of pendent jurisdiction.

3. This Court has personal jurisdiction over Essex Wire Corporation.

4. This Court does *not* have personal jurisdiction over Walter F. Probst.

5. Venue is proper in this District Court as to Essex Wire Corporation. Venue is improper here as to Walter F. Probst.

6. Plaintiff contends that the Michigan common law governs the Arber-Essex transaction because Essex was incorporated in Michigan. *Zahn v. Transamerica Corp.*, 162 F.2d 136 (3rd Cir. 1947).

7. Under Michigan law, directors purchasing their corporation's stock for themselves do not stand in a fiduciary relationship to selling shareholders. *Walsh v. Goulden*, 130 Mich. 531, 90 N.W. 406 (1902).

8. Under Michigan law, defendant had no duty to provide the Arbers with information disclosed in Essex's books and records. *Schuur v. Berry*, 285 Mich. 654, 281 N.W. 393 (1938); *Gammon v. Dain*, 238 Mich. 30, 212 N.W. 957 (1927); *Buckley v. Buckley*, 230 Mich. 504, 202 N.W. 955 (1925); *Bollstrom v. Duplex Power Car Co.*, 208 Mich. 15, 175 N.W. 492 (1919); *Walsh v. Goulden*, 130 Mich. 531, 90 N.W. 406 (1902). *Blakeslee v. Wallace*, 45 F.2d 347 (6th Cir. 1930).

9. The evidence is uncontroverted that all financial information including earnings per share and book value, all repurchases of stock by Essex, the fact Essex was buying its own shares from time to time, the existence of the Holton agreement, the Essex stock purchase plan and loans made thereunder, and all transactions by officers and directors would be revealed in Essex financial statements, books and records. (Findings ¶¶ 25-33). Accordingly, there was no duty under the law of Michigan to disclose any of the foregoing facts.

10. The only duty of a director imposed by Michigan law regarding disclosure of corporate information to a selling shareholder is the duty to disclose any "special

facts" not set forth in the corporation books and records which greatly enhance the apparent value of the stock. *Gammon v. Dain,* 238 Mich. 30, 212 N.W. 957 (1927); *Buckley v. Buckley,* 230 Mich. 504, 202 N.W. 955 (1925); *Bollstrom v. Duplex Power Car Co.,* 208 Mich. 15, 175 N.W. 492 (1919). Defendant did not violate this duty because the evidence shows there existed no facts not available form the records of the corporation, (Findings ¶¶ 34-42) and no plan to utilize repurchase of Essex stock and the stock purchase plan to increase stock value (Findings ¶¶ 50-70).

11. Indiana common law imposes no greater duty to disclose than does Michigan law. *Board of Commissioners of Tippecanoe County v. Reynolds,* 44 Ind. 509, 15 Am. Rep. 245 (1873). The now repealed Indiana Securities Act creates no additional duties or obligations apposite to this case. Accordingly, this Court's conclusion that defendant did not violate any duty to disclose would obtain even if Indiana law were applicable to this transaction.

12. Under Section 10b of the Securities Exchange Act of 1934 or Rule 10b-5 promulgated thereunder, plaintiff cannot succeed in this action because she failed to prove the existence of a 10b violation. Federal decisions under Rule 10b-5 impose a duty similar to that required by Michigan law. Thus, the federal cases hold that a director need not reveal information obtainable from the corporation records. *City National Bank v. Vanderboom,* 422 F.2d 221, 230-31 (8th Cir.), cert. denied, 399 U.S. 905 (1970); *Myzel v. Fields,* 386 F.2d 718, 736 (8th Cir. 1967), cert. denied, 390 U.S. 951 (1968). As in the Michigan decisions, federal cases finding liability uniformly rely on assured "special facts" such as mergers and sale of assets, not ascertainable from the books, which greatly appreciate

stock value. *Connelly v. Balkwill*, 174 F.Supp. 49 (N.D. Ohio 1959), aff'd, 279 F.2d 685 (6th Cir. 1960); *S.E.C. v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2nd Cir. 1968); *Speed v. Transamerica Corp.*, 99 F.Supp. 808 (D.Del. 1951).

13. Under Indiana, Michigan and Federal Securities law, defendant had a duty not to make knowingly false misrepresentations of fact. *Candler v. Heigho*, 208 Mich. 115, 175 N.W. 141 (1919); *List v. Fashion Park, Inc.*, 340 F.2d 457 (2d Cir.), cert. denied, 382 U.S. 811 (1965); *Middlekamp v. Hanewich*, 263 N.E.2d 189 (Ind. 1970). The evidence establishes this duty was not violated for the following reasons:

a. There is no creditable evidence of any representation of fact. Statements regarding "a very good price" and the like, are statements of opinion, not fact. *Blakeslee v. Wallace*, 45 F.2d 347 (6th Cir. 1930); *Willson v. Canfield*, 18 Ohio L.Abs. 417, Case 2, 419 (Ct. App. 1934).

b. The evidence establishes that $350 per share was a fair and reasonable price for the Arbers' Essex shares (Findings ¶¶ 71-87).

c. Defendant Probst's sale of his own stock at the same and similar prices establishes that at the time of the Arber sale he reasonably believed $350 per share was a fair and reasonable price for the Arber stock (Findings ¶ 67).

14. Under Michigan, Indiana and Federal Securities law plaintiff must establish that if she had possessed certain allegedly concealed or misrepresented facts, she would not have sold her stock and would continue to own the stock today. *City National Bank v. Vanderboom*, 422 F.2d 221, 230 (8th Cir.), cert. denied, 399 U.S. 905 (1970); *List v. Fashion Park, Inc.*, 340 F.2d 457, 463 (2nd Cir.), cert.

denied 382 U.S. 811 (1965); *Gordon v. Lipoff*, 320 F.Supp. 905, 912-14 (W.D. Mo. 1970); *McIntyre v. Lyon*, 325 Mich. 165, 37 N.W. 2d 903 (1949); *Lebeis v. Rutzen*, 298 Mich. 1, 286 N.W. 134 (1939). The evidence discloses that plaintiff did not meet this burden of proof because she ignored advice to hold the stock because Essex was "going places", ignored all prospects of future growth, ignored all financial data available, and sold for other reasons (Findings ¶¶ 40-46). Moreover, she did not even testify that she would not have sold but would have retained the stock today if she had been aware of claimed concealed facts.

15. Federal courts in common law, diversity jurisdiction equity actions apply the law of the forum state on the issue of laches. 2 J. Moore, Federal Practice ¶ 3, at 752 (1970); 3 C.J.S. Federal Courts ¶ 188, at 442 (1960).

16. Ohio equity courts require that a party seeking to rescind a transaction act promptly upon being put on notice of a fact which may entitle him to relief. A party failing to act promptly is barred by the equitable doctrine of laches. *McLean v. Clapp*, 141 U.S. 429, 432 (1891); *Keyerleber v. Euclid Congregation of Jehovah Witnesses*, 103 Ohio App. 423, 143 N.E. 2d 313 (1957); *Morgan v. Virginian Joint Stock Land Bank*, 41 Ohio App. 558, 180 N.E. 202 (1931); *Hamilton v. Carr*, 17 O.C.C. (n.s.) 395 (1911).

17. Under the Ohio equity cases, plaintiff's delay of nearly two years from the time she became aware of claimed fraud until this suit was filed, during a period in which the market value of Essex stock increased by 60% constitutes laches and therefore bars rescission (Findings ¶¶ 88-90). *Morgan v. Virginian Joint Stock Land Bank*, 41 Ohio App. 558, 180 N.E. 202 (1931); *Keyerleber v. Euclid Congregation of Jehovah's Witnesses*, 103 Ohio App. 423, 143 N.E. 2d 313 (1957); *Corrigan v. Rockefeller*, 8 Ohio N.P. 281 (C.P. 1900) aff'd, 67 Ohio St. 354 (1902).

18. Federal 10b-5 decisions also require a party seeking rescission to move promptly. *Estate Counseling Service v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 303 F.2d 527-532 (10th Cir. 1962). Accordingly, plaintiff's delay in seeking rescission during a period in which the market value of Essex stock increased by 60% bars any claim for relief based upon rescission. *Baumel v. Rosen*, 412 F.2d 571, 574-75 (4th Cir. 1969).

19. The claims with respect to the twenty-five (25) shares held by Bertha Arber are not barred by the statute of limitations. These shares were part of the transaction, conduct and occurrence alleged in the original complaint. As such the amendment relates back to the date of the original pleading under Fed. R. Civ. P. 15(c). As a consequence, the statute of limitations does not bar any claim with respect to these shares.

20. The claims with respect to the twenty-five (25) shares held by Bertha Arber are not barred by res judicata.

21. The plaintiff has not sustained her burden of proof. The plaintiff has not proven her case by clear and convincing evidence nor even by a preponderance of evidence.

JUDGMENT

Accordingly, judgment is entered in favor of the defendant Essex Wire Corporation on both the federal and state claims. The complaint is dismissed as to defendant Walter F. Probst. Assuming, in the alternative, that there is jurisdiction and proper venue with respect to the claims against Walter F. Probst, judgment is entered in his favor on these claims.

This case is terminated.

IT IS SO ORDERED.

/s/ Thomas D. Lambros

United States District Judge

APPENDIX B

Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit

(Filed January 8, 1974)

No. 72-2121

No. 72-2122

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BERTHA ARBER, *et al.*,
Plaintiffs-Appellants-Cross-Appellees,

v.

ESSEX WIRE CORPORATION AND
WALTER F. PROBST,
Defendants-Appellees-Cross-Appellants.

On Appeal from the United States District Court for the Northern District of Ohio, Eastern Division.

Before: McCREE and KENT,* Circuit Judges and CECIL, Senior Circuit Judge.

McCREE, Circuit Judge. This is an appeal from a judgment for defendants in an action brought by appellants, Bertha Arber and Ann Arber Broek, her daughter, for rescission of a sale in 1961 of 525 shares of Essex Wire

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*Judge Kent died on May 28, 1973 and did not participate in this decision.

Corporation common stock to Essex.[1] The complaint, filed November 9, 1966, charged that Essex, the purchaser, and Walter F. Probst, the president of Essex at the time of sale and the principal negotiator on behalf of Essex, failed to disclose material facts relating to the stock's value in violation of state common law and of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b),[2] and the Securities and Exchange Commission's Rule 10b-5,[3] promulgated thereunder. The district court held that the evidence at trial did not establish any violation of state law or of

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1. Bertha Arber died during the pendency of this action and Ann Arber Broek, as her executrix, continued the action on Bertha Arber's behalf.

2. 15 U.S.C. § 78j provides in pertinent part:

Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

3. Rule 10b-5, 17 C.F.R. § 240.10b-5, provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

the federal securities law and, alternatively, that appellants' claims for rescission were barred by laches. Appellants appeal from an order of July 26, 1972, denying them a trial by jury and from the findings of fact and conclusions of law filed with the district court's decision on August 23, 1972. We affirm.

Herman Arber, a long-time employee of Essex and a plant manager for Essex until his death in 1948, the deceased husband of Bertha Arber and the father of Ann Arber Broek, originally purchased all 525 shares of stock that were transferred to Essex in the 1961 sale. In his will, Herman Arber bequeathed a life interest in 500 shares to Bertha Arber, with the remainder interest to Ann Arber (Broek), and 25 shares to Bertha Arber outright. In 1951, during a conversation with an attorney representing the Arbers in a transfer of their stock interests to a trust, Probst first inquired whether they might be interested in selling their stock to Essex for $100 per share. Subsequently, the attorney, on behalf of the Arbers, declined Essex' offer, and told Probst that Bertha Arber had a high regard for the management of Essex and believed the investment in the corporation was sound.

In 1959, Probst telephoned the Arbers and indicated that he had heard that they were interested in selling their Essex stock. The Arbers responded that they had not considered selling, but would discuss the matter with Probst. A meeting was held during which Probst informed the Arbers that Essex was doing well, showed them financial statements, and again, on behalf of Essex, offered to purchase their stock, this time for $250 per share. The Arbers responded that they wanted to consult family members and would contact Probst if any interest in selling developed. At some time after this, Ralph Arber, the brother of Ann Arber Broek and a competent businessman

who had worked for Essex at one time and later started his own business in competition with Essex, strongly advised Bertha Arber not to sell the Essex stock.[4]

Nevertheless, in early 1961 Ann Arber Broek contacted Probst and inquired whether Essex remained interested in purchasing its stock held by the Arbers. After this, a meeting was held between Probst and Broek, at which time Probst commented that Essex was continuing to do well and that the Arbers were fortunate in waiting because the price then being offered by Essex had risen from $250 per share to $350 per share. Broek replied that she wished to discuss the matter with other members of the family. Shortly thereafter, Broek telephoned Probst and informed him that after family discussion they had decided to accept Essex' offer of $350 per share, or $187,350. Some time late in 1961 the transaction was completed.

In January 1965, Broek learned from a prospectus that Essex shares were being offered to the public at a price, after adjustment for a stock split, equivalent to more than $2,000 per share transferred in 1961. She testified, ". . . we didn't do anything at first. My husband and I thought there was nothing that could be done." After some months had gone by they talked to an attorney who was an old family friend and later commenced this action on November 9, 1966 with the filing of the complaint against Probst and Essex. During the period of approximately 22 months between the Broeks' reading of the prospectus and the institution of this action, the value of the Essex stock appreciated by about sixty percent. The stock continued its meteoric rise and at the time of the trial in the district court, the price at which Essex

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4. Ralph Arber also testified that Probst discussed the potential sale of the Arbers' stock with him in several conversations.

was traded, according to appellants, was four times the price at which it had gone public in 1965.

Initially, after an evidentiary hearing in September 1970, the district court dismissed the federal claim on the grounds that the sale did not involve the use of the mails or other instrumentalities of interstate commerce. During trial, however, appellants offered newly discovered evidence on the jurisdictional issue, and the court, taking appellants' motion under advisement, permitted evidence to be presented on the federal as well as on the state law claim.

On this appeal the following issues are presented: (1) whether the evidence presented at trial established a violation of Section 10(b) in connection with the sale transaction; (2) whether the evidence presented at trial established that the conduct of the defendants constituted common law fraud; (3) whether appellants were denied their right to trial by jury guaranteed by the Seventh Amendment to the Constitution of the United States; and (4) whether the evidence supported the district court's conclusion that appellants' claims for rescission were barred by laches.

After a review of the entire record, we conclude that the findings of fact of the trial judge are not clearly erroneous, Fed. R. Civ. P. 52(a), and we set forth below the findings that are critical to the resolution of the issues presented on appeal.

We consider, first, appellants' claim under the federal securities law. The district court held that all allegedly undisclosed facts were either available to appellants or were not material. In addition, the court held that under federal as well as state law appellants must establish that if they had possessed the facts alleged to have been con-

cealed, they would not have sold the stock; and the court found as a fact that appellants would not have relied on the facts they claim were undisclosed. On appeal, appellants urge that the court applied too restrictive a doctrine in determining materiality, and that proof of reliance is not required for a 10b-5 violation under federal law.

At the outset, we observe that underlying this provision of federal securities law is the Congressional judgment that full disclosure will help to ensure fair dealing in insider transactions. It is settled that Section 10(b) proscribes nondisclosure, as well as affirmative misrepresentation, of "material facts" affecting a stock's value. *Securities and Exchange Commission v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968). This prohibition applies not only to an officer buying for his own account but also to a closely-held corporation, such as Essex in 1961, dealing in its own securities. *Kohler v. Kohler Co.*, 208 F.Supp. 808, 820, (E.D. Wis. 1962), *aff'd* 319 F.2d 634, 638 (7th Cir. 1963); *Northern Trust Co. v. Essaness Theatres Corp.*, 103 F.Supp. 954 (N.D. Ill. 1952).

The district court held that the requisite "materiality" could be demonstrated only by a showing of nondisclosure of "special facts" such as mergers or sales of assets, not ascertainable from the books, which "greatly appreciate" stock value. We think this test is overly restrictive of the Congressional purpose and contrary to the general interpretation of Section 10(b) in the federal courts. Whether undisclosed facts are "material" does not depend upon whether they concern specific transactions. Nor is it necessary that the facts be of such a nature that they "greatly appreciate" the stock's value. We adhere to the test stated by the Second Circuit Court of Appeals in the landmark *Texas Gulf Sulphur decision*: whether a rea-

sonable man would have attached importance to the undisclosed facts in determining his choice of action in the particular transaction in question. 401 F.2d at 849. *See also Northwest Paper Corp. v. Thompson*, 421 F.2d 137, 138 (9th Cir. 1970); *Securities and Exchange Commission v. Great American Industries, Inc.*, 407 F.2d 453, 459-60 (2d Cir. 1968), *cert. denied*, 395 U.S. 920 (1969); *List v. Fashion Park, Inc.*, 340 F.2d 457, 461-463 (2d Cir. 1965), *cert. denied*, 382 U.S. 811 (1966).

To apply this standard, it is necessary to identify what facts, if any, were not disclosed by defendants to the Arbers before Essex' purchase of the Arbers' shares of stock and to assess the significance, from a reasonable person's viewpoint in the context of the 1961 sale, of any nondisclosures. Appellants contend that defendants did not disclose the following facts: (1) the role of Essex management in controlling an "administered price;" (2) the personal interest of Probst and Essex management in the transaction; (3) the book value of the stock, which appellants allege, was more than double the amount offered; and (4) other material facts concerning the earnings and corporate activity and plans of Essex.

The crux of the first contention is that before Essex "went public" there was no competitive market for Essex shares, and the price at which the stock was sold by the Arbers, referred to by management as the "going price", was in fact established by management. We observe, however, that appellants were aware that Essex was a closely-held corporation, that its stock was not widely traded, and that they were selling to Essex itself, or to Probst, its president. Appellants also knew that if Essex ever went public, the increased marketability of the shares would likely increase their value considerably. A reasonable inference, though not one completely clear from the

record, is that appellants did know that the "going price" was set by management. Moreover, the district court expressly found that the going price "was arrived at after consideration of all relevant factors bearing on fairness, including the company's strengths and weaknesses and at what price knowledgeable persons . . . would sell." Indeed, the court found, on the basis of expert testimony, that the "going price" received by the Arbers was a "fair and reasonable" assessment of value at that time. This conclusion was reinforced by the stipulated existence of contemporaneous transactions between Essex and other sellers with extensive business experience and with knowledge of all available facts. They accepted the identical price received by the Arbers.[5] In this context, we do

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5. In their brief appellees set forth stipulated facts establishing both that the Arbers received the highest price paid up to the date of sale for their stock and that sellers with the most complete knowledge of Essex' operations, the company's own executives, made contemporaneous sales at the very same price:

	Sale Date	*Seller*	*Purchaser*	*Number Of Shares*	*Price Per Share*
	2/23/60	Roesler	Egger & Co.*	100	$250
	6/07/60	Shea	Mike & Co.*	6,000	$350
	12/23/60	A. F. Kammer, Jr.	International Wire*	1,370	$350
	1/03/61	Holton	Various Essex Employees	950	$350
	2/03/61	Taft	Egger & Co.*	40	$350
	2/21/61	Holton	Hirschman	50	$350
	3/28/61	Roesler	Egger & Co.*	75	$350
Arber Sale	5/06/61	Arber	Essex	525	$350
	6/02/61	Holton	Harrison	29	$350
	6/02/61	Holton	N. C. Kennedy and M. E. Kennedy	150	$350
	7/20/61	Probst	Egger & Co.*	72	$350
	2/12/62	Roesler	Gunn & Co.*	75	$375
	9/27/62	Probst	Various Essex Employees	2,925	$400

*Nominees of Essex

(Continued on following page)

not think that detailed knowledge of the precise mechanism for establishing the "going price" would have affected the choice of action of a reasonable person in the position of the Arbers.[6]

Footnote continued—

> It is uncontroverted that each of the above sellers had full knowledge of all available facts regarding Essex. In addition to President Probst, the other sellers occupied the following positions:
>
> (a) *Roesler* was Essex' Treasurer and chief financial officer in charge of preparing all financial statements and information. Mr. Roesler was thoroughly familiar with all details of stock purchases by Essex and was personally involved in virtually every transaction because as Treasurer he raised the money for each purchase.
>
> (b) *Shea* was a director and Vice-Chairman of the Board of Essex. In June of 1960 Mr. Shea sold his entire holdings in Essex—6,000 shares—for the same $350 per share price received by the Arbers. (App. 47.)
>
> (c) *Holton* was the founder, Chairman of the Board and Chief Executive Officer of Essex and held the controlling stock ownership interest in the Company.
>
> (d) *A. F. Kammer* was a director and the son-in-law of Holton. Mr. Kammer received full financial information concerning Essex. (App. 47).
>
> (e) *Taft*, a prominent lawyer who was and still is the senior partner in the 50-lawyer Boston firm of Herrick, Smith, Donald, Farley and Ketchum, had been an independent outside director for many years. Mr. Taft was a corporation lawyer, and a trustee for other shareholders in Boston. He acquired none of his shares under any Essex stock purchase plan. As a director Mr. Taft received complete financial information. (App. 47).
>
> Brief for appellees at 12-13.

We observe that the officers and directors of Essex sold their stock both to Essex itself and to Essex employees and other individuals.

6. The cases relied upon by appellants, *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972), and *Chasins v. Smith, Barney & Co.*, 438 F.2d 1167 (2d Cir. 1970), are inapposite here. In both of those cases the defendant acted as an agent for plaintiffs' purchase or sale of stock while, at the same time, the defendants did not disclose that they were making a market in the stock for their own benefit. In *Ute*, for example, the Court expressly observed that the record revealed "a misstatement of a material fact, within the proscription of Rule 10b-5 (2) namely, that the prevailing market price of the . . . shares was the figure at which [defendants'] purchases were made." 406 U.S. at 152.

The second contention, that of an undisclosed personal interest of Probst and Essex management in the transaction, hinges essentially on appellants' assertion that there existed a concealed plan of Essex and Probst, a major shareholder, for Essex to repurchase its own shares at a price less than book value for the purpose of increasing the value of all outstanding shares. The district court expressly found that appellants failed to prove the existence of such a plan.

Appellants also claim that appellees did not disclose book value which was substantially greater than the offer price, and other financial data such as earnings per share. This information, however, was readily available to appellants who, although aware of its existence and availability, were simply uninterested. We hold that an insider has no affirmative duty to direct a seller's attention to all routine data commonly found in the statements and books of the corporation, at least where that information is readily available; the outsider has knowledge that it is available and makes no inquiry; and the information thus available is not of an unusual or extraordinary nature.

Not only was this information available upon request but also, here, Probst informed plaintiffs that the company was doing well, and, perhaps more importantly, Ralph Arber provided them with his opinion of the company's potential from his perspective as a past employee and present competitor of Essex. He believed that Essex had excellent prospects for the future and, in advising Bertha Arber not to sell, told her that Essex was a "helluva company" and a "gung-ho outfit", that it was "going to go a long way" because of its competent and aggressive management, and that if the stock ever went public it would be very valuable.

Appellants argued, but did not prove, that at the time of the sale, management had definite plans reasonably certain to increase the value of the stock. We do not suggest that a fixed plan of future corporate activity may never be viewed as a material fact. Mere speculation, however, does not provide any basis for Section 10(b) liability. Certainly developments *subsequent* to the 1961 sale greatly increased the value of the Essex stock and no doubt the Arbers' sale of their shares proved improvident by hindsight. But Section 10(b) does not require that an insider "confer upon outside investors the benefit of his superior financial or other expert analysis by disclosing his educated guesses or predictions." *Texas Gulf Sulphur Co., supra,* at 848. In short, the law mandates disclosure only of existing material facts. It does not require an insider to volunteer any economic forecast.

We hold that appellees did not fail to disclose any material inside information. We do not find it necessary, therefore, to decide whether the district court's alternative finding that appellants would not have relied on any facts claimed to have been undisclosed is supported, and, if so, what its legal significance would be under Section 10(b).[7]

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7. In *Affiliated Ute Citizens of Utah v. United States,* 406 U.S. 128 (1972), the United States Supreme Court held:

> Under the circumstances of this case, involving primarily a failure to disclose, *positive proof of reliance is not a prerequisite to recovery.* All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision. See *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375, 384 (1970); *SEC v. Texas Gulf Sulphur Co.,* 401 F. 2d 833, 849 (CA2 1968), cert. denied *sub nom. Coates v. SEC,* 394 U.S. 976 (1969); 6 L. Loss, Securities Regulation 3876-3880 (1969 Supp. to 2d ed. of Vol. 3); A. Bromberg, Securities Law, Fraud—SEC Rule 10b-5, §§ 2.6 and 8.6 (1967). This obligation to disclose and this withholding of a material fact establish the requisite element of causation in fact. *Chasins v. Smith, Barney & Co.,* 438 F. 2d, at 1172.

406 U.S. at 153-54 (emphasis added).

(Continued on following page)

We also hold that appellants have not proved their claim of violation of state law. The district court did not specifically decide whether Michigan law or Indiana law was controlling, for it held that appellants' evidence was insufficient to establish fraud under the case law in either jurisdiction. We agree. *Buckley v. Buckley,* 230 Mich. 504, 202 N.W. 955 (1925); *Bollstrom v. Duplex Power Car Co.,* 208 Mich. 15, 175 N.W. 492 (1919); *Board of Commissioners of Tippecanoe County v. Reynolds,* 44 Ind. 509, 15 Am. Rep. 245 (1873); *Lebeis v. Rutzen,* 298 Mich. 1, 286 N.W. 134 (1939). Neither state provides a broader cause of action in cases of nondisclosure than that provided by Section 10(b).

There remains to be considered appellants' claim that they were denied their Seventh Amendment right to jury trial. The district court struck the jury demand, reasoning that "[i]nasmuch as plaintiffs pray for rescission of the sale of the shares of stock, the Court must conclude that equitable relief is sought." Appellants rely upon *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959) and *Dairy Queen, Inc. v. Wood,* 369 U.S. 469 (1962), for the proposition that where legal and equitable claims are asserted in a single action, the right to trial by jury of the issues presented in the legal claim cannot be denied just because their determination is also necessary in the determination of the equitable claims. And, appellants contend that in addition to their claim for rescission, admittedly equitable in nature, they requested alternative relief in the form of money damages, incidental damages

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Footnote continued—

This, of course, makes clear that the Record in a 10b-5 action for nondisclosure need not contain an affirmative demonstration of plaintiffs' reliance. But we need not decide whether an affirmative showing by defendants that plaintiffs would not have relied might defeat an otherwise valid claim.

for dividends and distributions attributable to the Essex stock, and punitive damages, all of which, appellants argue, are legal claims entitling them to trial by jury.

We agree with the general proposition that appellants derive from *Beacon* and *Dairy Queen*. But appellants' contention that their complaint contained legal, and not merely equitable, claims for relief must be examined in the context in which the jury demand was stricken. Before the demand was stricken, the district court had dismissed the federal 10b-5 claim for want of jurisdiction and appellants were proceeding solely under Ohio law, which required an election between legal and equitable proceedings. *Frederickson v. Nye*, 110 Ohio St. 459, 144 N.E. 299 (1924); *Baird v. Howard*, 51 Ohio St. 57, 36 N.E. 732 (1894). A federal court in a common law diversity action, the context of the suit at the time the jury demand was stricken, would enforce such an election. *Berger v. State Farm Mutual Automobile Insurance Company*, 291 F.2d 666 (10th Cir. 1961). *See also Myzel v. Fields*, 386 F.2d 718, 740 n.15 (8th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968). Therefore, we hold that the district court properly concluded that appellants had elected to proceed in equity and, accordingly, there was no right to a jury trial at the time the demand was stricken. Because appellants requested the equitable remedy of rescission and were bound by Ohio's election of remedies doctrine, they could not simultaneously assert a claim for legal relief. For this reason, *Beacon* and *Dairy Queen* are simply inapposite here.

The conclusion that appellant had elected to proceed solely in equity is not in conflict with the third amended complaint. The complaint prayed for the rescission of the sale and delivery of the original shares to Arber and Broek, plus dividends and other distributions since 1960,

and for punitive damages; in the alternative, it asked for a judgment equal to the difference between the amount paid for the stock and its current market value, plus dividends and distributions attributable to the stock, and punitive damages. It is evident that appellants' alternative claim did not request a traditional measure of damages at law, which would be the difference between what was received by appellants and the fair market value of the share of stock at the time of the sale. *E.g., Ross v. Licht*, 263 F.Supp. 395 (S.D.N.Y. 1967). *But cf. Myzel v. Fields, supra*, at 740-42. Instead, appellants requested the monetary equivalent of rescission, equal to the difference between the sale price and the current market value of the stock. This request, as well as the request for the monetary equivalent of dividends and distributions on the stock, is of an equitable nature. Finally, assuming but not deciding that the claim for punitive damages was permissible under Ohio law, we observe that many courts have awarded punitive damages in equity, as well as at law. 48 A.L.R. 2d 947, 955 (1956).

But for the election under operation of state law and the fact that the federal claim had been stricken, we would regard the claim of abridgment of the right to trial by jury as presenting a substantial question, because, the test for whether a jury right exists under *Beacon* and *Dairy Queen* is not if the claim in question is "primarily" legal or equitable in nature, but whether the claim could have been brought at law. There is even the possibility that appellants' Seventh Amendment claim might have been revived during the course of the trial, when the court, on the basis of "newly discovered evidence", explored reconsideration of the federal 10b-5 claim, because at this stage of the proceedings, appellants were not bound to an election by operation of state law. If appellants had then re-

asserted their jury demand,[8] the dispositive question would have been whether appellants' alternative claims for monetary damages could have been brought at law.

For example, if the only remedy sought by appellants was rescission, it is clear there would be no right to jury trial. *Richland v. Crandall*, 259 F. Supp. 274, 276 n.1, (S.D.N.Y. 1966). It is equally clear that a claim for compensatory damages would have given rise to a right to jury trial. *Dasho v. Susquehanna Corporation*, 461 F.2d 11 (1972). As we have indicated above, however, appellants' request for monetary damages is not for traditional compensatory damages because it sought an amount equal to the value of rescission. We observe that one court has held that relief similar to that sought by appellants here in their alternative claim, termed by the court as "recisional damages", was a legal claim to which attached a right to trial by jury. *Myzel v. Fields*, *supra*, at 740-42. But we find it unnecessary to resolve here the question whether appellants claim for monetary relief could have been brought at law, because even if legal issues were raised in the 10b-5 claim, appellants' contention that their Seventh Amendment rights were violated cannot prevail.

When new legal issues arise during the course of a non-jury trial, they can certainly be determined by the court with the express or implied consent of the parties. *Scholl v. Scholl*, 152 F.2d 672 (D.C. Cir. 1945); *Fidelity and Deposit Co. v. Krout*, 157 F.2d 912 (2d Cir. 1946); *Smith v. Cushman Motor Works Co.*, 178 F.2d 953 (8th Cir. 1950). *See generally* 5 Moore's *Federal Practice* § 38.41, 329 (1971). Here, appellants' counsel not only

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8. Since no effort was made to do so, we find it unnecessary to decide whether a jury demand could have been asserted without leave of the court. *See* Fed. R. Civ. P. 38.

failed to suggest to the court that the revived federal claim raised new legal issues, but also appears to have agreed to trial by the judge alone of all issues on the 10b-5 claim.

This acquiescence is found in several colloquies between the court and appellants' counsel. During trial, the court specifically asked counsel if he would be able to introduce evidence on the federal claim for the court's consideration:

> "The Court: All right, let's just for a minute—and I realize it is late, but so we can proceed right on. I am inclined, gentlemen, in order that I can review the case in its proper perspective and also take another look at the jurisdictional question that we passed on previously, I am inclined to consider a reopening—to reconsider the action that was dismissed by this Court. And to the extent that it would be reopened, if counsel wish to introduce evidence, I would like to make a complete record and reexamine that question in light of all the evidence in this case. If the Court states to counsel that it would reconsider reopening—reinstating, rather—the cause of action that was dismissed, are you in a position to introduce your evidence and complete your evidentiary presentation based on that decision?
>
> "Mr. Stillman: Yes, we are, your Honor."

And at the close of the evidence, the court made clear, again, that it desired to consider evidence and argument on the federal claim:

> "Now, the matter of the Federal cause of action is still open. I have heard evidence on that matter. I would ask that in your briefs you address yourselves to that question as well, for after submission of the

> briefs and the arguments I may decide to reinstate that Federal cause of action and decide the merits on both causes of action, or in my final judgment I might reaffirm my original position and proceed to decide solely the State claim. So I would suggest that counsel address themselves to that as well."

Since the court thus advised appellants' counsel that it might reconsider its previous determination about federal jurisdiction and reinstate the federal claim, it was not further obligated, *sua sponte*, to impanel a jury. Appellants have not directed our attention to any objection to the court's procedure concerning the federal claim, either at trial or in the post-trial briefs and we have found none. From all that appears, we conclude that any right to consideration by a jury of any legal claims that might have arisen during the trial was waived.

There is a further reason for rejecting appellants' Seventh Amendment claim. Appellants' proof, in our view, failed to raise issues of fact sufficient to go to the jury. Although the trial court made no such finding because it was not required to do so, we conclude from an examination of the record that reasonable men could not differ on the proposition that defendants did not fail to disclose any material inside information. *Northwest Paper Company v. Thompson*, 421 F.2d 137 (9th Cir. 1969). *See also Whitsel v. Alexandre*, 229 F.2d 47, 49 (7th Cir. 1956).

Because our determinations on the foregoing issues are dispositive, we do not consider whether the district court correctly held that the 22 month delay between the date appellants learned from the prospectus that the Essex stock was "going public", at a price greatly in excess of the amount received by appellants in the 1961 sale, and the date they instituted this action, during which

time the value of the stock appreciated by sixty percent, constituted laches barring appellants' claims for rescission. *See Keyerleber v. Euclid Congregation of Jehovah's Witnesses*, 103 Ohio App. 423, 143 NE 2d 313 (1957); *Estate Counseling Service v. Merrill Lynch, etc.*, 303 F.2d 527 (10th Cir. 1962); *Baumel v. Rosen*, 412 F.2d 571, 574 (4th Cir. 1969).

Judgment affirmed.

Judgment of the Court of Appeals

(Filed January 8, 1974)

Nos. 72-2121, 72-2122

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BERTHA ARBER, ANN ARBER BROEK,

Plaintiffs-Appellants, Cross-Appellees,

vs.

ESSEX WIRE CORPORATION, WALTER F. PROBST,

Defendants-Appellees, Cross-Appellants.

JUDGMENT

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Defendants-Appellees recover from Plaintiffs-Appellants, the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

ENTERED BY ORDER OF THE COURT

/s/ JAMES A. HIGGINS

Clerk

APPENDIX C

Order of the United States Court of Appeals Denying Petition for Rehearing

(Filed February 11, 1974)

No. 72-2121

No. 72-2122

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BERTHA ARBER, *et al.*,
Plaintiffs-Appellants,

-vs-

ESSEX WIRE CORPORATION, *et al.*,
Defendants-Appellees.

ORDER

BEFORE: McCREE and KENT*, *Circuit Judges*, and CECIL, *Senior Circuit Judge.*

The petition for rehearing and brief in support thereof having come on to be heard, upon consideration, it is ORDERED that the petition be, and it hereby is, DENIED.

Entered by order of the court

/s/ JAMES A. HIGGINS
Clerk

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*Judge Kent died on May 27, 1972, and did not participate in this decision.